

U.S. Department of
Homeland Security

United States
Coast Guard



Director
United States Coast Guard
National Pollution Funds Center

US COAST GUARD STOP 7100
4200 WILSON BLVD STE 1000
ARLINGTON VA 20598-7100

[REDACTED]
Fax: 703-872-6113

5890

5/28/2014

[REDACTED]
Inland Waters of Ohio, Inc.
ATTN: Mr. Richard Shircliff
2195 Drydock Ave
Cleveland, OH 44113

Re: Claim Number 914078-0001

Dear Mr. Shircliff,

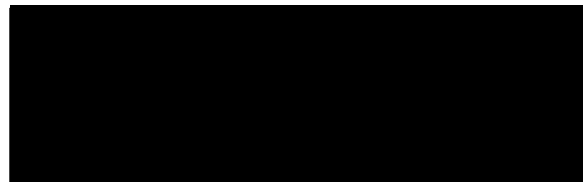
The National Pollution Funds Center (NPFC) in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on your claim number 914078-0001. Please see the enclosed Claim Summary/Determination Form for further explanation.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter or 30 days from the date of receipt, whichever is earlier and it must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. If, however you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request.

Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number 914078-0001.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100



Claims Manager
U.S. Coast Guard

ENCL: Claim Summary / Determination Form

CLAIM SUMMARY / DETERMINATION FORM

Claim Number	: 914078-0001
Claimant	: Inland Waters of Ohio, Inc.
Type of Claimant	: Corporate
Type of Claim	: Removal Costs
Claim Manager	: Alyssa Lombardi
Amount Requested	: \$5,698.64

FACTS:

A. Oil Spill Incident:

The State of Ohio Environmental Protection Agency (OHEPA) reports that on November 11, 2010, road debris caused a saddle tank to rupture on a truck that was driving on US I-90 in Conneaut, OH. As a result of the rupture, approximately 50 gallons of diesel fuel spilled. The State On-Scene Coordinator (SOSC) stated that no fuel had entered into waters, but did impact the dry ditch along I-90 just east of the Ohio Route 7 On-Ramp. Inland Waters of Ohio, Inc. was contacted by the Conneaut Fire Department (FD) for clean up¹.

A Responsible Party (RP), Mr. William Bailey (owner and operator of the truck) was identified for this spill but, to date, has not remitted payment to the Claimant. The Claimant also prepared and submitted a claim to the RP's insurance, but this claim was denied².

B. Description of removal actions performed:

Inland Waters of Ohio, Inc. (Claimant) arrived on-scene on November 11, 2010, assessing the spill site with both the Conneaut FD and the RP. The Conneaut FD placed oil dry on the roadway prior to the Claimant's arrival. Once on scene, the Claimant started removing contaminated soils and placed them in a roll-off box.

The following day, the Claimant took topsoil, seed and straw and backfilled the excavated area. It left the sorbent boom in front of the culvert in the event that fuel leaked through.

On December 10, 2010, the Claimant returned to the site and pulled the remaining booms, taking back a bag of contaminated sorbents to the roll-off for disposal. The contents of the roll-off were finally disposed of on January 14, 2011.

C. The Claim: On May 22, 2014, Inland Waters of Ohio, Inc. submitted a removal cost claim to the National Pollution Funds Center (NPFC), for reimbursement of its uncompensated removal costs in the amount of \$5,698.64 for the services provided from November 11, 2010 through January 14, 2011. This claim is for removal costs based on the rate schedule in place at the time services were provided. A copy of the vendor rate schedule is provided in the claim file.

The review of the actual cost invoicing and dailies focused on: (1) whether the actions taken were compensable "removal actions" under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented.

¹ See, Ohio EPA District Office Investigation Report, page 2.

² See, Auto-Owners Insurance denial letter dated December 5, 2012.

APPLICABLE LAW:

Under OPA 90, at 33 USC § 2702(a), a responsible party for a vessel or facility from which oil is discharged or which poses a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines is liable for removal costs and damages resulting from such incident.

"Oil" is defined in relevant part, at 33 USC § 2701(23), to mean "oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil".

"Removal costs" are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from an incident". 33 USC § 2701(31).

Removal costs referred to in 33 USC 2702(a) include any removal costs incurred by any person for acts taken by that person which are consistent with the National Contingency Plan. 33 USC 2702(b)(1)(B).

The Oil Spill Liability Trust Fund (OSLTF), which is administered by the NPFC, is available, pursuant to 33 USC §§ 2712(a)(4) and 2713 and the OSLTF claims adjudication regulations at 33 CFR Part 136, to pay claims for uncompensated removal costs that are determined to be consistent with the National Contingency Plan and uncompensated damages.

With certain exceptions all claims for removal costs or damages shall be presented first to the responsible party of the source designated under 2714(a). 33 U.S.C. § 2713(a). If the claim is not settled by any person by payment within 90 days after the date the claim was presented, the claimant may elect to commence an action in court against the responsible party or present the claim to the Fund. 33 U.S.C. §2713(c)(2).

"Claimant" means "any person or government who presents a claim for compensation under this subchapter." 33 USC § 2701(4).

33 USC § 2712(f), which is entitled "Rights of Subrogation," provides that payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action the claimant has under any other law. 33 USC § 2715(a).

Under 33 CFR 136.105(a) and 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 CFR 136.105(b) each claim must be in writing, for a sum certain for each category of uncompensated damages or removal costs resulting from an incident. In addition, under 33 CFR 136.203, the claimant bears the burden to prove the removal costs were reasonable in response to the scope of the oil spill incident, and the NPFC has the authority and responsibility to perform a reasonableness determination. Specifically, under 33 CFR 136.203, "a claimant must establish --

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions;
- (c) That the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."

Under 33 CFR 136.205 “the amount of compensation allowable is the total of uncompensated *reasonable* removal costs of actions taken that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. Except in exceptional circumstances, removal *activities* for which costs are being claimed must have been coordinated with the FOSC.” [Emphasis added].

DETERMINATION OF LOSS:

A. Overview:

1. FOSC coordination has not been obtained or provided by The United States Environmental Protection Agency Region in accordance with 33 CFR §§ 136.203(c) and 205.
2. In accordance with CFR § 136.105(e)(12), the Claimant has reported on its Claim Form that it has commenced an action in court to recover the costs which are subject of the claim.
3. The claim was submitted within the six year statute of limitations. 33 U.S.C. § 2712(h)(1).
4. A Responsible Party has been identified. 33 U.S.C. § 2701(32).
5. The NPFC Claims Manager has thoroughly reviewed all documentation submitted with the claim and determined that none of the removal costs presented were for actions in accordance with the NCP and that the costs for these actions were indeed reasonable and allowable under OPA and 33 CFR § 136.205.

B. Analysis:

NPFC CA reviewed the actual cost invoices and dailies to confirm that the claimant had incurred all costs claimed. The review focused on: (1) whether the actions taken were compensable “removal actions” under OPA and the claims regulations at 33 CFR 136 (e.g., actions to prevent, minimize, mitigate the effects of the incident); (2) whether the costs were incurred as a result of these actions; (3) whether the actions taken were determined by the FOSC, to be consistent with the NCP or directed by the FOSC, and (4) whether the costs were adequately documented and reasonable. The Claims Manager validated whether or not the costs incurred were reasonable and necessary and performed in accordance with the National Contingency Plan (NCP).

Upon review of the claim submission, the NPFC notes that the Claimant provided well-documented dailies to show the actions it performed although the Claimant has failed to provide documentation that this spill either discharged into or substantially threatened a navigable waterway of the US. The Claimant states that the spill occurred 150 feet west of Smokey Run, which runs into Conneaut Creek, and eventually into Lake Erie. However, there is no confirmation from the Federal On Scene Coordinator (FOSC) which in this case is the United States Environmental Protection Agency Region V, that this incident posed a substantial threat of discharge into a navigable waterway. The OHEPA Initial Pollution Incident Report provided by the Claimant not only states that it ran off into a dry ditch, but that there were no waterways affected. Additionally, pictures taken by the OHEPA at the spill site (also provided by the Claimant) show that the potential receiving stream was not impacted by the oil spill.

Additionally, the Claimant has reported on its NPFC Claim Form that it has commenced an action in Court to recover costs which are subject of this claim. In accordance with the governing claims regulations, it states at 33 CFR §136.103(d) that no claim of a person against the Fund will be approved or certified for payment during the pendency of an action by the person in court to recover costs which are the subject of the claim. As such, the NPFC would not be able to make an offer if the claim was determined compensable while an action pends in Court therefore the Claimant would need to produce all evidentiary documentation and decisions made by the Court in order to demonstrate the completion of such an action.

Finally, the facts and evidence do not support a finding that an OPA-incident occurred. They also do not support a finding that the claimed costs would be compensable under OPA. Though oil did leak into the environment, the Claimant has not provided documentation to demonstrate a discharge or substantial threat of a discharge to a navigable waterway occurred, as required under OPA. The evidence also does not demonstrate that the Claimant's actions were directed by an FOSC or that an FOSC determined that they were consistent with the NCP.

Under 33 CFR 136.203, a Claimant must establish that the actions taken were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC. The Claimant provided no documentation that shows any involvement by an FOSC. The Claimant does not even allege that the USCG or EPA were even contacted, much less present on scene and no evidence that notification to the National Response Center (NRC) was performed as required.

Based on the foregoing, the claim is denied because (1) the Claimant has failed to demonstrate the actions were determined by the FOSC to be consistent with the NCP, (2) that the actions undertaken by the Claimant were directed by the FOSC in accordance with 33 CFR §136.203 & 205, and (3) that the incident was a substantial threat to a navigable waterway.

C. Determined Amount: \$0.00

Claim Supervisor:

Date of Supervisor's review: 5/28/14

Supervisor Action: *Denial approved*

Supervisor's Comments: